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No. 98-440

In The

Supreme Court of the United States

October Term, 1997

ROGER M. DONLON, et al.,

Petitioners,

v.

CITY OF OXNARD and COMMUNITY FACILITIES DISTRICT NO. 88-1 OF THE CITY OF OXNARD (OXNARD TOWN CENTER),

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California, Second District, Division Six

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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12 pp

TABLE OF CONTENTS

Page

I. STATEMENT OF THE CASE 1

II. THE REASONS WHY THE COURT SHOULD DENY THE DONLONS' PETITION FOR WRIT OF CERTIORARI 2

III. ARGUMENT 3

A. Taxing Districts Are Typically Formed Without The Involvement Of Lienholders 3

B. There Is Nothing Unconstitutional About Giving A Governmental Lien Priority Over A Previously Recorded Private Lien 5

C. Unpublished Opinions Are Frequently Used By An Overworked Judiciary 5

IV. CONCLUSION 7

TABLE OF AUTHORITIES

Page

CASES

City of Birmingham v. Smyer, 230 Ala. 234, 160 So. 764 (1935) 4

City of Richmond v. Williams, 102 Va. 733, 47 S.E. 844 (1904) 4

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821) 4

Drainage Commissioners v. East Carolina Home & Farm Association, 165 N.C. 697, 81 S.E. 947 (1914) 4

Federal Deposit Insurance Corp. v. City of New Iberia, 924 F.2d 610 (5th Cir. 1991) 4

Fitchpatrick v. Botheras, 150 Iowa 376, 130 N.W. 163 (1911) 4

Furman v. United States, 720 F.2d 263 (2d Cir. 1983) 6

German Savings & Loan Society v. Ramish, 138 Cal. 120, 69 P. 89 (1902) 4

Holmes v. Bowen, 60 Ohio. App. 168, 19 N.E.2d 974 (1938) 4

King v. Champion, 55 F.3d 522 (10th Cir. 1995) 5

Leitch v. City of Dublin, 160 Ga. 691, 128 S.E. 889 (1925) 4

Mortgage Company v. Lory, 109 W. Va. 310, 154 S.E. 136 (1930) 4

Provident Institution for Savings v. Mayor and Aldermen of Jersey City, 113 U.S. 506 (1885) 5

Radio Station WOW v. Johnson, 326 U.S. 120 (1945) 4

TABLE OF AUTHORITIES – Continued

Page

Schad v. Arizona, 501 U.S. 624 (1991) 4

Taylor v. McKeithen, 407 U.S. 191 (1972) 5

United States v. Baynes, 548 F.2d 481 (3d Cir. 1977) 6

Zipperer v. City of Fort Meyers, 41 F.3d 619 (11th Cir. 1995) 4

CONSTITUTIONS AND STATUTES

California Constitution, Article VI, § 14 5

California Government Code §§ 53311, *et seq.*, ... 1

RULES OF COURT

California Rules of Court, Rule 977(b)(1) 6

First Circuit Rule 36.2 6

Second Circuit Rule § 0.23 6

Third Circuit Internal Operating Procedure, Ch. 6 6

Fourth Circuit Rules 36(a)-(c) 6

Fifth Circuit Rule 47.5 6

Sixth Circuit Rule 24 6

Seventh Circuit Rule 53 6

Eighth Circuit Rule 28A(k) and Internal Operating Procedures, App. I 6

Ninth Circuit Rules 36-1-3 6

Tenth Circuit Rules 36.1-.3 6

TABLE OF AUTHORITIES – Continued

Page

Eleventh Circuit Rules 36-1-3 6

District of Columbia Circuit Rule 36 6

Federal Circuit Rules 36 and 47.6 6

United States Supreme Court Rule 10 3

I.
STATEMENT OF THE CASE

In 1987, the Donlons bought an interest in a recorded deed of trust securing a note for just under $12,000,000. (1 CT 188-192.)[1] The note called for annual payments of just under $2,000,000 for five years with the balance, $8,300,000, then being due. (1 CT 193.) The income from the land was just over $154,000 a year. (Petition for rehearing in the Court of Appeal at 2-3.) However, the Donlons were willing to buy the note because the owners of the land had plans for a substantial project which called for "converting the [land] from its then use as agricultural property to retail, commercial, residential and industrial uses." (SCT 189.)

In 1988, the City of Oxnard formed Community Facilities District No. 88-1 of the City of Oxnard (Oxnard Town Center) (the "District") under the Mello-Roos Community Facilities Act of 1982, California Government Code §§ 53311, *et seq.*, to finance the construction of streets, highways and other infrastructure which would support the development of the land. (1 CT 12.) In order to do this, the District was authorized to, and did, sell almost $15,000,000 in bonds which were to be repaid through the levy and collection of special taxes. (*Id.*)

The project did not go forward because of adverse economic conditions. The owner of the project stopped paying the special taxes in 1991. (1 CT 14.) In 1993, the District and the City sued to judicially foreclose the lien

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[1] "CT" means the Clerk's Transcript on appeal and "SCT" the Supplemental Clerk's Transcript.

provided by California law to secure the payment of the special taxes. (1 CT 1.) At the time the judgment was entered in 1996, the unpaid special taxes were in excess of $12,000,000 with interest mounting at the rate of 1.5% per month. (Appendix C to the Petition at 8c-10c.)

The Court of Appeal's decision affirming the trial court's judgment made it clear that California law gives the lien securing the special taxes a super priority (Appendix A to the Petition at 20a-22a) which means that the Donlons' deed of trust – the security for their note – will be wiped out when the lien securing the special taxes is foreclosed.

II.

THE REASONS WHY THE COURT SHOULD DENY THE DONLONS' PETITION FOR WRIT OF CERTIORARI

The questions presented by the Donlons fall into two categories. The first has to do with the validity of the process by which California law allows the adoption of special taxes and the priority that it accords to the lien securing their repayment. The second has to do with the validity of unpublished appellate opinions.

The Donlons are, of course, unhappy that their investment, made in the heady days of 1987, has ended up as yet another victim of the California real estate depression of the 1990's. Throughout the foreclosure proceedings, the Donlons have made every argument – constitutional, statutory and *ad hominem* – to save themselves from what turned out to be a bad investment decision.

However, the Donlons' unhappiness at having made a bad investment decision in 1987 is no reason why the Court should grant their petition in 1998 because neither of the criteria set forth in Rule 10 for granting a petition for a writ of certiorari to review a decision of a state court has been met. The Donlons have not cited a single case which shows that the California Court of Appeal's opinion conflicts with the decision of any other court; that it presents an important, but unsettled, question of federal law; or that it conflicts with relevant decisions of this Court.

III.

ARGUMENT

A. Taxing Districts Are Typically Formed Without The Involvement Of Lienholders

The situation in the case at bar has arisen repeatedly in the context of special assessment districts. In each case, the lienholder has recorded his or her lien, a special assessment district has been formed without notice being given to the lienholder, an assessment secured by a lien which has priority over private liens has been imposed, the landowner has failed to pay the assessment, and the holder of the previously recorded lien has attacked the priority of the assessment lien on the ground that due process was denied because he or she was not given notice of the formation of the district. In every case,

federal and state, the lienholder has lost.[2] *See, e.g., Zipperer v. City of Fort Meyers*, 41 F.3d 619 (11th Cir. 1995), *Federal Deposit Insurance Corp. v. City of New Iberia*, 924 F.2d 610 (5th Cir. 1991), *Holmes v. Bowen*, 60 Ohio. App. 168, 19 N.E.2d 974 (1938), *City of Birmingham v. Smyer*, 230 Ala. 234, 160 So. 764 (1935), *Mortgage Company v. Lory*, 109 W. Va. 310, 154 S.E. 136 (1930), *Leitch v. City of Dublin*, 160 Ga. 691, 128 S.E. 889 (1925), *Drainage Commissioners v. East Carolina Home & Farm Association*, 165 N.C. 697, 81 S.E. 947 (1914), *Fitchpatrick v. Botheras*, 150 Iowa 376, 130 N.W. 163 (1911), *City of Richmond v. Williams*, 102 Va. 733, 47 S.E. 844 (1904), and *German Savings & Loan Society v. Ramish*, 138 Cal. 120, 69 P. 89 (1902).

The Donlons have not cited a single case to the contrary.[3]

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[2] The Donlons spend much of their Petition arguing that the Court of Appeal misunderstood and misapplied California statutory and case law. (Petition at 9-19.) "These are matters of state law and not our concern." *Radio Station WOW v. Johnson*, 326 U.S. 120, 129 (1945). This follows from the Court's fundamental principle that it is not free to substitute its interpretation of state law for those of a state court. *Schad v. Arizona*, 501 U.S. 624, 636 (1991).

[3] None of the federal cases cited by the Donlons deal with facts which are even close to those presented by the case at bar. As such, they provide no support for the Donlons' position. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399-400 (1821).

B. There Is Nothing Unconstitutional About Giving A Governmental Lien Priority Over A Previously Recorded Private Lien

This Court held over 100 years ago that government could constitutionally give a governmental lien priority over a previously recorded private lien. *Provident Institution for Savings v. Mayor and Aldermen of Jersey City,* 113 U.S. 506 (1885).

The Donlons have not cited a single case to the contrary.

C. Unpublished Opinions Are Frequently Used By An Overworked Judiciary

The California Constitution, Article VI, § 14, requires that every decision of a California appellate court be in writing with reasons stated. There is no corresponding federal constitutional requirement and case law has made it clear that the use of unpublished summary decisions pass constitutional muster.

> "Petitioner's other complaints about the Oklahoma court's issuance of a summary opinion in his direct appeal are similarly unavailing. First, as we have said before, there is nothing inherently objectionable in the Oklahoma court's use of summary opinions in unpublished cases." *King v. Champion,* 55 F.3d 522, 526 (10th Cir. 1995).

Several federal Circuit Courts of Appeal have cited this Court's statement in *Taylor v. McKeithen,* 407 U.S. 191, 194 n.4 (1972), which agreed that the Courts of Appeals "should have wide latitude in their decisions of whether

or how to write opinions." *See, e.g., Furman v. United States*, 720 F.2d 263, 264-265 (2d Cir. 1983), and *United States v. Baynes*, 548 F.2d 481 (3d Cir. 1977).

In fact, every one of the federal Circuits has adopted local rules which provide for the designation of opinions as applying only to the litigants involved, having no precedential value, with many of the local rules expressly prohibiting the publication of these opinions. First Circuit Rule 36.2; Second Circuit Rule § 0.23; Third Circuit Internal Operating Procedure, Ch. 6; Fourth Circuit Rules 36(a)-(c); Fifth Circuit Rule 47.5; Sixth Circuit Rule 24; Seventh Circuit Rule 53; Eighth Circuit Rule 28A(k) and Internal Operating Procedures, App. I; Ninth Circuit Rules 36-1-3; Tenth Circuit Rules 36.1-.3; Eleventh Circuit Rules 36-1-3; District of Columbia Circuit Rule 36; and Federal Circuit Rules 36 and 47.6.

All of the rules cited above make it clear that, while an unpublished opinion may not be cited as precedent, it nevertheless invokes the doctrines of res judicata, law of the case and collateral estoppel.[4] Thus, all litigants – the ones most involved in any case – receive all of the protection that the judicial process provides whether or not an opinion is published.

The Donlons have not cited a single case to the contrary.

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[4] This is the rule in California. *See* Rule 977(b)(1) of the California Rules of Court, quoted in the Petition at 24.

IV.

CONCLUSION

The City and the District contend that the Donlons' petition for writ of certiorari should be denied.

Respectfully submitted,

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